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정치학석사학위논문

# **What are Minimum Core Obligations?**

*Conceptualizing a Performative Standard for Economic, Social  
& Cultural Rights to Complement Progressive Realization*

최소핵심의무에 관한 연구

2018 년 2 월

서울대학교 대학원  
정치외교학부 정치학전공

송 윤 권

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## 최소핵심의무에 관한 연구

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이 논문을 정치학 석사 학위논문으로 제출함

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## **ABSTRACT**

The doctrine of ‘minimum core obligations’ has emerged in the past few decades as part of United Nations’ international human rights law rhetoric with regard to the protection of economic, social and cultural rights. While the doctrine remains to be tested as a powerful instrument in the protection of these human rights, there remain a number of imposing problems that demand to be answered. One such problem – or arguably, the main problem – is the uncertainty that persists regarding the exact meaning, content, and practicality of the doctrine. The aim of this thesis is, therefore, to determine the purpose of the minimum core obligations doctrine and its subsequent implications. In this thesis, I will argue that the preexisting doctrine of progressive realization implies a standard of state performance that is both progressive and variable. These two characteristics of progressive realization – while necessary for the protection of social, economic and cultural rights – are also the doctrine’s biggest deficiencies. In light of this fact, the doctrine of minimum core obligations complements progressive realization and its deficits by constituting a subsequent performative standard that is immediate, complete, and universal.

**Keywords:** minimum core obligations, progressive realization, performative standard, core obligations, core rights, John Tasioulas

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# I. INTRODUCTION

*“The notion of minimum core obligations is considered a common element of all Covenant rights and the raison d’être of the Covenant.”<sup>1</sup>*

In a report presented to the United Nations General Assembly in 2015, the Economic and Social Council (ECOSOC)<sup>2</sup> – one of the six main organs of the United Nations (UN) – rearticulated and reinforced UN’s stance on the duty<sup>3</sup> for all signatory (and presumptively also non-signatory) states parties to the International Covenant on Economic, Social and Cultural Rights to fulfill their ‘minimum core obligations’. The doctrine of minimum core obligations has been presented as playing an essential role in the fulfillment of economic, social and cultural rights, to the extent that it has been portrayed as constituting even the fundamental purpose, or “the raison d’être”, of the International Covenant on Economic, Social and Cultural Rights.<sup>4</sup> This portrayal elucidates the direction that the UN has decided to take, promoting the doctrine of minimum core obligations as part of its international human rights law rhetoric and elevating the doctrine to the status of customary international law.

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<sup>1</sup> Part III, Chapter D, Para. 27, in UN General Assembly, *Report of the United Nations High Commissioner for Human Rights*, E/2015/59 (19 May 2015).

<sup>2</sup> The Economic and Social Council (ECOSOC) was established in 1945, in accordance with Chapter III, Article 7, of the UN Charter. ECOSOC constitutes one of the six main organs of UN and is responsible for monitoring the implementation of economic, social and cultural rights.

<sup>3</sup> The terms ‘duty’ and ‘obligation’ are used interchangeably throughout the text.

<sup>4</sup> UN General Assembly, E/2015/59.

The doctrine of minimum core obligations was first introduced into the realm of international human rights law in 1990. In contrast to civil and political rights that are guaranteed to all human beings at all times and that evoke immediate repercussion on the side of states parties in the case of encroachment, economic, social and cultural rights are realized gradually over time at the discretion of states parties in the recognition that states have a limited amount of resources at their disposal and are, therefore, unable to fulfill all economic, social and cultural rights fully immediately. This recognition that economic, social and cultural rights are to be gradually ensured is incorporated into the International Covenant on Economic, Social and Cultural Rights as the doctrine of 'progressive realization'. The doctrine of progressive realization, while serving as a mechanism of flexibility and a realistic answer to the practical limitations of states parties, has been met with international criticism for serving as a loophole for states parties through which they can indefinitely delay their obligations towards the full realization of economic, social and cultural rights. Consequently, in what has been regarded as a response to these concerns, in 1990, the Committee on Economic, Social and Cultural Rights introduced the doctrine of minimum core obligations to ensure that at least the minimum levels of economic, social and cultural rights would be satisfied without delay. Shrouded in high expectations, the doctrine of minimum core obligations has been met with anticipation that it will serve as a norm of state action that will set a clear standard for what the states parties must do to fulfill at least the minimum levels of economic, social and cultural rights.

Broadly speaking, the doctrine of minimum core obligations constitutes a standard of human rights protection that "ensure[s] the satisfaction of, at the very least, minimum essential levels

of each of the [economic, social and cultural] rights”.<sup>5</sup> As such, the doctrine has been referred to as the ‘floor’ of human rights protection – the level of human rights below which no human being should be allowed to fall.<sup>6</sup> Within the academic field, the notion of minimum core obligations has been used to refer to both the core content of rights (or core rights) that all human beings are entitled to, and the state obligations (or core obligations) that derive from core rights and guide what states must do to ensure at least the fulfillment of the core rights. A number of countries including Colombia, India, Argentina, Hungary, and Spain have all partially adopted the doctrine of minimum core obligations into parts of their constitutional law, with the constitutional court of South Africa most closely engaged in determining the significance of the doctrine with regard to their own constitution.<sup>7</sup>

At least a few questions remain to be answered with regard to the doctrine, however, that prevents widespread espousal of the doctrine by states parties as UN might hope. Firstly, the doctrine of minimum core obligations has yet to be properly defined in its meaning, purpose, scope and content. Does the notion of minimum core obligations refer to core rights or core obligations, or both? What do core rights or core obligations convey exactly? Are minimum core obligations universal or relative? Secondly, the doctrine of minimum core obligations, although articulated as a legitimate interpretation of the authoritative UN body on the matter (the Committee on Economic, Social and Cultural Rights), does not explicitly appear in the International Covenant on Economic, Social and Cultural Rights and requires, therefore, widespread support from the international community to become legally binding on states

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<sup>5</sup> CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, E/1991/23 (14 December 1990). Para. 10.

<sup>6</sup> Audrey Chapman and Sage Russell, "Introduction," in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, ed. Audrey Chapman and Sage Russell (Antwerp: Intersentia, 2002). p. 9.

<sup>7</sup> Katharine G. Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012). p. 80.



parties as part of customary international law.<sup>8</sup> As we will see, these two problems are intimately connected. Because the notion of minimum core obligations is indeterminate in its meaning purpose, scope and content, states parties feel hesitant to embrace the notion completely and feel reluctant to apply it in their constitution law and jurisprudence. All the while, the lack of application and support from the international community further entrenches the doctrine as being empty and without any actual significance or applicability.<sup>9</sup> It is of paramount importance, therefore, to determine the notion of minimum core obligations to which this thesis will be dedicated.

In this thesis, I will argue that the doctrine of minimum core obligations constitutes a standard of state performance that complements the doctrine of progressive realization. Minimum core obligations as a standard of state performance dictates *how* obligations pertaining to core rights should be carried out by states parties, instead of determining which rights belong to the core – a task that requires setting apart certain rights as more superior or valuable, and therefore also more urgent. Minimum core obligations as a performative standard, then, constitutes an immediate and universal duty for all states parties to fulfill at least the minimum essential level of economic, social and cultural rights, determined by the concept of the standard baseline, presented by Tasioulas.

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<sup>8</sup> For a more detailed discussion on how the doctrine of minimum core obligations can be incorporated into international human rights law, refer to John Tasioulas, "Minimum Core Obligations: Human Rights in the Here and Now," *World Bank* (2017), p. 1.

<sup>9</sup> For examples of jurisprudence that raise the problem of indeterminacy of minimum core obligations, refer to South African Constitutional Court cases: *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC). (S. Afr.), *South Africa v Grootboom* 2001 (1) SA 46 (CC) at 66 (S. Afr.), and *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at 722 (S. Afr.).

The standard baseline sets a common standard of state capacity across all states parties based on the principle that, “for almost all states, for almost all of the time, it is possible and not unduly burdensome for them immediately to comply with the putative obligation in full”.<sup>10</sup> Consequently, the doctrine of minimum core obligations complements the flexible nature of progressive realization with respect to resources and time. Minimum core obligations demand states parties to fulfill the “minimum essential level” of economic, social and cultural rights (determined by the standard baseline) both immediately and in full. The doctrine, therefore, creates a separate domain of operation, in contrast to progressive realization, that demands immediate and complete implementation of the minimum essential level of economic, social and cultural rights.<sup>11</sup>

The notion of minimum core obligations can come to be useful in at least three respects.<sup>12</sup> First, minimum core obligations can respond to the urgency of providing at least the “minimum essential level” of economic, social and cultural rights to those whose rights are not protected. Next, minimum core obligations can compensate for the flexible nature of progressive realization, balancing the flexibility with a concrete, fixed universal standard incumbent upon all states parties alike. Lastly, minimum core obligations can provide an initial standard of resource redistribution among states parties in the name of international cooperation that would not be exceedingly demanding or unacceptable to the more well-off states.

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<sup>10</sup> John Tasioulas. p. 24.

<sup>11</sup> Ibid. p. 14.

<sup>12</sup> Katharine G. Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content," *The Yale Journal of International Law* 33, no. 1 (2008). p. 4.

## **1.1 Thesis Structure**

In Chapter I, the doctrine of minimum core obligations is introduced and how the doctrine has been studied by scholars so far is explored. At the end of this section, the importance of minimum core obligations to be approached from a core obligations perspective is presented. In Chapter II, the history leading up to the introduction of the two covenants is explained, and the way that the doctrine of progressive realization constitutes a standard of state performance that is progressive with regard to resources and time, constituting a performative standard that is relative to each state party, is presented. In this section, problems that the progressive and variable nature of progressive realization poses to human rights implementation is also examined. Chapter III begins with contrasting the immediate effect of civil and political rights in comparison to the doctrine of minimum core obligations with regard to social, economic and cultural rights. Next, the difference between core rights and core obligations is explored, describing how minimum core obligations constitute a performative standard that contrasts and complements the doctrine of progressive realization. Tasioulas' theory of minimum core obligations is utilized in this section to constitute minimum core obligations as a performative standard that is immediate, complete, and universal. Finally, Chapter IV concludes the thesis with ideas for further research and remarks on lingering questions.

## **1.2 The Concept of the Core, Core Rights, and Core Obligations**

Among the academic literature on minimum core obligations, there exists confusion as to what the doctrine conveys exactly, what the doctrine implies for the states parties, and whether the doctrine is itself a valuable addition to the existing corpus of international human rights law. Furthermore, this uncertainty has been proliferated by the way that a multiplicity

of terminologies has come to be used to refer to one and the same doctrine. Examples of these terminologies include ‘minimum core content’, ‘minimum subsistence rights’, ‘minimum essential levels’, ‘international minimum threshold’, ‘core content’, ‘essential elements’, ‘core obligations’, and ‘minimum state obligations’.<sup>13</sup> Additionally, these varying articulations often also indicate a particular characteristic or element highlighted by the author to serve a specific purpose.<sup>14</sup> Nevertheless, we are able to identify a tradition of studies that focuses on the concept of the ‘core’ and explores how the core is distinguished from the non-core (or periphery)<sup>15</sup> to confer the core with a heightened sense of urgency and importance. The study on the concept of the core is followed by two distinct groups or perspectives that stem therefrom. The first of the two perspectives are studies that approach minimum core obligations from the perspective of rights, or more specifically, studies that attempt to determine the scope and content of each of the economic, social and cultural rights. The second group of studies, on the other hand, attempt to approach minimum core obligations from the perspective of obligations by determining not what or which rights are more urgent and belonging to the core, but rather looks at how core rights should be enforced and ensured.

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<sup>13</sup> Lisa Forman, Luljeta Caraoshi, Audrey R. Chapman, and Everaldo Lamprea, "Conceptualising Minimum Core Obligations under the Right to Health: How Should We Define and Implement the ‘Morality of the Depths’," *The International Journal of Human Rights* (2016). p. 536.; Sage Russell, "Introduction - Minimum State Obligations: International Dimensions," in *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives*, ed. Danie Brand and Sage Russell (Pretoria: Protea Book House, 2002). p. 14.

<sup>14</sup> We will use the term, ‘minimum core obligations’, as initially introduced by the UN in 1990 (see *infra* Chapter III).

<sup>15</sup> The terms ‘non-core’ and ‘periphery’ will be used interchangeably throughout the text.

### 1.2.1 Study of the Concept of the ‘Core’

If we trace the steps back to the beginning, we are able to identify the origin of the concept of the ‘core’ in the context of the German and Turkish constitutions. Leijten explains that the concept of the core was first utilized in the German Basic Law of 1949.<sup>16</sup> The fundamental idea behind the concept of the core was the thought that there were certain elements pertaining to core rights that were to be seen as essential or fundamental, to the extent that in the case that the legislative or executive body would perpetuate actions that would disregard or violate these elements, it would be perceived as unconstitutional. The difference between core rights and the non-core rights was that whereas the latter was acknowledged to be susceptible to limitations in certain cases and situations, such limitations were not permitted for the core. The Basic Law thus adopted an idea of ‘a limit to limitations’. Leijten also explains that the concept of the core, though first perceived to be useful, suffered problems with the indeterminacy of the concept and it became increasingly difficult for both the judicial and the executive bodies to determine what the concept of the core conveyed in article 19 (2) of the German Constitution conveyed exactly. Consequently, the problem of indeterminacy rendered the doctrine “negligible if not redundant”, causing the concept of the core to remain a significant idea without any real implications.<sup>17</sup>

A similar historical approach to the concept of the core has also been carried out by Esin Örüçü.<sup>18</sup> Örüçü, after studying the constitutions of West Germany and Turkey, suggests that

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<sup>16</sup> Ingrid Leijten, "The European Convention on Human Rights and Minimum Core Socio-Economic Rights Protection," *World Congress of Constitutional Law 2014* (2014).

<sup>17</sup> *Ibid.* p. 11.

<sup>18</sup> Esin Örüçü, "The Core of Rights and Freedoms: The Limits of Limits," in *Human Rights: From Rhetoric to Reality*, ed. Tom Campbell et al. (New York: Blackwell, 1986).

rights are divided into the ‘core’, the ‘circumjacence’, and an ‘outer edge’. The core represents the essence of the right, that which may not be violated by the state for any particular reason. Surrounding the core is the circumjacence of rights followed by the outer edge, comprising two spheres which the state may infringe upon at times if a particular dire situation or context demands it and legitimate reasons can be given. Örücü’s tripartite distinction is noteworthy in three ways.<sup>19</sup> First, the distinction reveals that the state may have legitimate reasons to infringe upon rights at certain times, allowing for states to derogate from their obligations if absolutely necessary. Second, it articulates the idea that certain rights or elements within rights may be so essential to human beings that they cannot be violated for any reason. Third, the conceptual differentiation between the core and the non-core creates a model that makes aids the practical implementation of rights, providing a guideline for states on which lines they may cross for which reasons and which lines they may absolutely not cross for any given reason.

In a similar spirit, while Leijten and Örücü have focused on the historical roots of the concept of the core to deduce the meaning and significance of the core, Forman et al. explore the way that the concept of the core has been conceptualized over time, with specific focus on how the core is conceptualized in relation to the periphery. Forman et al. point out that three articulations of the core are notable in particular.<sup>20</sup> The first articulation conceptualizes the core as the ‘essence’ of the whole, constituting the most important element of rights. This view constructs a hierarchy that places the most value on the core; the part of rights without which the rest of rights would lose its value. The core as essence holds a value that cannot

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<sup>19</sup> Notre Dame Law Review Editors, "Book Note," *Notre Dame Law Review* 62, no. 3 (2014), 494.

<sup>20</sup> Lisa Forman, Luljeta Caraoshi, Audrey R. Chapman, and Everaldo Lamprea.

be compensated by the values expressed in the periphery of rights. The core represents that part of a right that cannot be replaced or compromised. The second articulation constitutes the core as the 'floor'. The core as the floor represents both the furthest limit or lowest point of human rights protection, beyond which it should not fall. The floor also represents the beginning point of action, the foundation, on which the remainder of rights can gradually be implemented. The floor as a starting point of action can be taken to indicate both a temporal and a material starting point towards the full realization of human rights. The third articulation constitutes the core as the 'minimum' that states should do to guarantee that human rights, or at least some urgent matters within human rights, are ensured. This last view emphasizes the very least that states parties should do, thereby placing emphasis on the performance of states parties.

The three articulations, while all relating to the concept of the core, depict three distinct aspects of the concept of the core. The core as essence highlights the way that the core is valued differently than the periphery, giving the core a heightened status, while the floor represents the inviolable nature of the core, thereby also constituting the core as a starting point of state action. Finally, the core as minimum indicates that at least certain state action is required on the side of states parties to ensure that at least a certain level of human rights is guaranteed. Taking these investigations of what the concept of the core may suggest with regard to human rights or the realm of jurisprudence in general, scholars have taken the concept and have applied it into the context of minimum core obligations and determining the meaning of the notion in relation to economic, social and cultural rights. In particular, scholars have approached minimum core obligations from the perspective of rights by attempting to conceptualize the distinct nature of the core content.

### 1.2.2 Study of the Core from a Rights Perspective

The rights perspective allows for an inquiry into the question of what factor or nature determines the core content of economic, social and cultural rights, bestowing the content of core rights with superior status or value over the content of non-core rights. Determining core rights involves, first and foremost, distinguishing the core from the non-core and identifying what makes the core more important or urgent than the periphery. In one such study, Young points out two natures that could determine the content of core rights.<sup>21</sup>

The first nature is referred to as the 'essence'. The nature of essence constitutes core rights as the most vital part of a right, the part of a right that derives its heightened status from certain superior norms or values. There always exists, then, a contrast between the core and the periphery, with the core enjoying a more privileged status while the periphery has comparatively diminished value and is marginalized. Two conceptualizations of the core as essence are mentioned in particular. First, the core can be construed as need-based. The need-based core appeals directly to certain basic needs connected to human life and survival. In other words, core rights are more important or valuable because they represent the basic needs of human beings. This basic-needs argument is exemplified in the way that scholars argue that core rights must be ensured first before other non-core rights are ensured because core rights represent the basic subsidy that everyone needs to survive.<sup>22</sup> The second version

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<sup>21</sup> Katharine G. Young, *Constituting Economic and Social Rights*.; See also, Katharine G. Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content."

<sup>22</sup> For example, see Lisa Forman, "What Future for the Minimum Core? Contextualising the Implications of South African Socioeconomic Rights Jurisprudence for the International Human Right to Health," in *Global Health and Human Rights: Legal and Philosophical Perspectives*, ed. J. Harrington and M. Stuttaford (Taylor & Francis, 2010).; David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance," *South African Law*



of the core as essence constitutes a value-based understanding of the core. This version shifts the focus away from basic needs and turns towards a different and broader question of what it means to be human. This shift places emphasis on values like dignity, equality and freedom, claiming the importance of core rights over the periphery because core rights represent particular inviolable values that are essential to the flourishing of human beings.

Next, Young presents the nature of 'consensus'. Consensus represents an accumulation of state practice, overlapping jurisprudence by national and international bodies, or treaty texts and documents that converge on a specific content of rights as having a more superior status or value. This collective agreement around a specific content of rights constitutes the core. Although each state party may have a different consideration as to why core rights are more urgent or valuable than non-core rights, it is the convergence of opinion, or collective agreement, around a certain content of rights that endows core rights with its special value. In other words, instead of consensus serving as a means to deriving some element that gives core rights its heightened status, consensus acts as an end in itself that endows core rights with the superior status.

A number of scholars have attempted to determine the scope and content of core rights. The scope and content of each economic, social and cultural right are examined with the recognition that every right constitutes a unique set of requirements and conditions; this, despite equal importance and value across all economic, social and cultural rights.

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*Journal* 119 (2002).; Mesenbet Assefa, "Defining the Minimum Core Obligations - Conundrums in International Human Rights Law and Lessons from the Constitutional Court of South Africa," *Mekelle University Law Journal* 1, no. 1 (2010).; Oliver Fuo and Anél Du Plessis, "In the Face of Judicial Deference: Taking the "Minimum Core" of Socio-Economic Rights to the Local Government Sphere," *Law, Democracy and Development* 19 (2015).

Determining each core rights' scope and content allows for practical and contextual entitlements to be identified, 'operationalizing' obligations for effective implementation and the possibility to identify violations. Scholars have worked to explore the scope and content of the right to work under article 6<sup>23</sup>, right to form and join trade unions under article 8<sup>24</sup>, right to social security under article 9<sup>25</sup>, family rights under article 10 (1)<sup>26</sup>, special measures of protection and assistance for children under article 10 (3)<sup>27</sup>, right to adequate food under article 11<sup>28</sup>, right to adequate housing under article 11<sup>29</sup>, right to health under article 12<sup>30</sup>,

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<sup>23</sup> Richard Siegel, "The Right to Work: Core Minimum Obligations," in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, ed. Audrey Chapman and Sage Russell (Antwerp: Intersentia, 2002).; Richard Siegel, "The Right to Work: South Africa's Core Minimum Obligations," in *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives*, ed. Danie Brand and Sage Russell (Pretoria: Protea Book House, 2002).

<sup>24</sup> Colin Fenwick, "Minimum Obligations with Respect to Article 8 of the International Covenant on Economic, Social and Cultural Rights," in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, ed. Audrey Chapman and Sage Russell (Antwerp: Intersentia, 2002).; Colin Fenwick, "The Minimum Core Content of Trade Union Rights in the South African Context," in *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives*, ed. Danie Brand and Sage Russell (Pretoria: Protea Book House, 2002).

<sup>25</sup> Lucie Lamarche, "The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights," in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, ed. Audrey Chapman and Sage Russell (Antwerp: Intersentia, 2002).; Sandra Liebenberg, "The Right to Social Security: A Response from a South African Perspective," in *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives*, ed. Danie Brand and Sage Russell (Pretoria: Protea Book House, 2002).

<sup>26</sup> Maja Eriksson, "Family Rights and the United Nations Covenant on Economic, Social and Cultural Rights: Article 10(1)," in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, ed. Audrey Chapman and Sage Russell (Antwerp: Intersentia, 2002).

<sup>27</sup> Geraldine Van Bueren, "The Minimum Core Obligations of States under Article 10(3) of the International Covenant on Economic, Social and Cultural Rights," *ibid.*; Geraldine Van Bueren, "Of Floors and Ceilings: Minimum Core Obligations and Children," in *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives*, ed. Daniel Brand and Sage Russell (Pretoria: Protea Book House, 2002).; Frans Viljoen, "Children's Rights: A Response from a South African Perspective," *ibid.*, ed. Danie Brand and Sage Russell.

<sup>28</sup> Rolf Künemann, "The Right to Adequate Food: Violations Related to Its Minimum Core Content," in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, ed. Audrey Chapman and Sage Russell (Antwerp: Intersentia, 2002).

<sup>29</sup> Pierre de Vos, "The Essential Components of the Human Right to Adequate Housing - a South African Perspective," in *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives*, ed. Danie Brand and Sage Russell (Pretoria: Protea Book House, 2002).

<sup>30</sup> Audrey Chapman, "Core Obligations Related to the Right to Health," in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, ed. Audrey Chapman and Sage Russell (Antwerp: Intersentia, 2002).; Audrey Chapman, "Core Obligations Related to the Right to Health and Their Relevance for South Africa," in *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives*, ed. Danie

right to education under article 13<sup>31</sup>, right to take part in cultural life under article 15 (a)<sup>32</sup>, and the right to enjoy the benefits of scientific progress, its applications, and the protection of intellectual property thereof under article 15 (b) & (c)<sup>33</sup>. Out of these rights the right to health has received the most attention, possibly due to the fact that it is thought to be the most vague and indeterminate right.<sup>34</sup>

### **1.2.3 Study of the Core from an Obligations Perspective**

The next group of scholars have approached minimum core obligations from the obligations perspective. This obligations perspective focuses on the performative nature of obligations – i.e. on how state obligations are to be carried out – rather than looking at how the concept of the core is theorized or how core rights are constituted. This way of studying minimum core obligations from the perspective of obligations has emerged more recently. The obligations approach allows for a closer examination of the different performative natures that constitute minimum core obligations, which types of obligations fall into the category of core obligations, and what practical implications core obligations imply.

The idea of approaching the doctrine from an obligations perspective is most prevalent in John Tasioulas' theory of minimum core obligations. In his research paper presented by the

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Brand and Sage Russell (Pretoria: Protea Book House, 2002).; Karrisha Pillay, "South Africa's Commitment to Health Rights in the Spotlight: Do We Meet the International Standard?," *ibid.*

<sup>31</sup> Fons Coomans, "In Search of the Core Content of the Right to Education," in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, ed. Audrey Chapman and Sage Russell (Antwerp: Intersentia, 2002).

<sup>32</sup> Stephen Hansen, "The Right to Take Part in Cultural Life: Toward Defining Minimum Core Obligations Related to Article 15 (1)(a) of the International Covenant on Economic, Social and Cultural Rights," *ibid.*

<sup>33</sup> Richard Claude, "Scientists' Rights and the Human Right to the Benefits of Science," *ibid.*; Audrey Chapman, "Core Obligations Related to Icescr Article 15(1)(C)," *ibid.*

<sup>34</sup> Katharine G. Young, *Constituting Economic and Social Rights*. p. 76.

World Bank, “Minimum Core Obligations: Human Rights in the Here and Now”, Tasioulas presents a number of different natures that could constitute core obligations.<sup>35</sup> The first nature is immediacy. Immediacy or immediate effect contrasts the notion of progressive realization that is conveyed in the International Covenant on Economic, Social and Cultural Rights. The nature of immediate effect constitutes a temporal condition and demands immediate implementation of core obligations by the states parties. Many scholars who study minimum core obligations from an obligations perspective emphasize the immediate nature of core obligations.<sup>36</sup> The next alternative is the non-derogable nature. Minimum core obligations as non-derogable does not allow for any excuses to be given in the case of nonfulfillment of core obligations on the part of states parties, even if states may have legitimate reasons for the deviation perpetuated, such as national emergency situations, natural crises, and war. In no circumstances, whatsoever, may minimum core obligations remain unfulfilled according to the non-derogable nature of core obligations. Finally, the performative nature of justiciability demands minimum core obligations to ensure all violations of core rights to be justiciable before the court, be it regional, national, or international. Tasioulas explains that these natures of core obligations are not mutually exclusive, but that they can work in tandem with each other. The main point of the investigation into the nature of core obligations is, however, to discover which nature plays a key role in the constitution of core obligations and is, therefore, an indispensable component.

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<sup>35</sup> John Tasioulas.

<sup>36</sup> For example, see *ibid.*; J. Asher, *Focus on Core Obligations*, A Resource Manual for NGOs ed. (Leiden - Boston: Martinus Nijhoff Publishers, 2010).; Fatma E. Marouf, "Socioeconomic Rights and Refugee Status: Deepening the Dialogue between Human Rights and Refugee Law," *American Journal of International Law* 103 (2009).; Brigit Toebe, "The Right to Health," in *Economic, Social, and Cultural Rights*, ed. A. Eide, C. Krause, and A. Rosas (Leiden: Leiden: Brill, 2001).; Nicholas Wasonga Orago, "The Place of the “Minimum Core Approach” in the Realisation of the Entrenched Socio-Economic Rights in the 2010 Kenyan Constitution," 59, no. 2 (2015).

It will be worth briefly noting research carried out on minimum core obligations with regard to the South African Constitution. A subgroup of scholars focuses on the South African Constitution and a series of Constitutional Court jurisprudence surrounding the application of the notion of minimum core obligations in the South African context. In a series of Constitutional Court cases (*Soobramoney v Minister of Health*, 1998, *South Africa v Grootboom*, 2001, and *Minister of Health v Treatment Action Campaign*, 2002), minimum core obligations have become the main topic of discussion after being evoked by the plaintiff in the protection of core rights. A majority of these studies focus on the court cases, discussing the significance of minimum core obligations and making comparisons between the notion and the concept of 'reasonableness'<sup>37</sup> to determine the practical implications of the two.<sup>38</sup>

#### **1.2.4 Call to Abandon Minimum Core Obligations Altogether**

Finally, there are also a number of scholars who argue that arguments against the doctrine of minimum core obligations are insurmountable and the doctrine should thereby be abandoned or be used simply as a rhetorical tool with which the Committee and the UN can negotiate compliance vis-à-vis states parties. One such proponent, Harris, lists five criticisms against

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<sup>37</sup> The reasonableness approach adopted by the South African constitutional court can generally be understood as a form of decision-making logic that aims to take into account reason and evidence, as well as the purpose and proportionality of the decision. For more information on the reasonableness approach, see David Bilchitz. p. 495-6.

<sup>38</sup> Karin Lehmann, "In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core," *American University International Law Review* 22, no. 1 (2007).; Sandra Liebenberg, "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?," *Law, Democracy & Development* 6, no. 2 (2002).; Fons Coomans, "Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law* (2005).; Craig Scott and Philip Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise," *South African Journal on Human Rights* 16, no. 2 (2000).; Mesenbet Assefa.; David Bilchitz.

the use of minimum core obligations, balancing the arguments with counter-arguments to determine whether the criticisms hold up.<sup>39</sup> Harris' five arguments against minimum core obligations are that:

1. The notion of minimum core obligations, while seeming to complement the vague nature of progressive realization, is itself intolerably indeterminate, devoiding the notion of any significance or utility.
2. The notion is too rigid, both temporally and spatially, not accounting enough for contextual differences and changes over time.
3. The notion is not justiciable due to its indeterminate nature.
4. The notion neglects those who are deprived in the developed nations because it focuses mainly on the bare minimum of human rights protection in the developing nations.
5. By setting a minimum within the minimum, it undermines the full implementation of economic, social and cultural rights.

Out of the five criticisms, Harris takes the fifth and last argument, that the doctrine of minimum core obligations undermines the full implementation of economic, social and cultural rights, to be the most detrimental to the notion of minimum core obligations; enough to argue for the abandonment of the notion. At the end of this thesis, we will return to this fifth and last criticism to assess whether minimum core obligations has enough reason to be constituted within the international human rights law.

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<sup>39</sup> Max Harris, "Downsizing Rights: Why the 'Minimum Core' Concept in International Human Rights Law Should Be Abandoned," *Public Interest Law Journal of New Zealand* (2013).

## **1.3 Legitimizing the Obligations Perspective Over the Rights**

### **Perspective**

Having laid out the general differences between those that approach minimum core obligations from the perspective of core rights, the perspective of core obligations, and those that oppose the doctrine altogether, it is worth noting that most studies generally begin by determining the nature, scope, and content of the core – i.e. take the rights perspective – and conclude with determining the nature of core obligations as a side note. In other words, most studies begin by asking the question of how core rights are constituted, only to occasionally move on to answer the question of how core rights should be ensured. This approach of engaging with the core rights first from the rights perspective, however, restricts the practicality of minimum core obligations as an effective enforcement standard, which it was created to be. Conceptualizing the notion of core rights as the first step restricts the way that those core rights can be carried out or ensured. The problem lies in that the content of core rights as normative ideals can be too extensive to be realized fully for an ordinary state party, creating a standard of human rights protection that is out of touch with reality. If we instead, however, approach minimum core obligations from the perspective of core obligations, we are able to first conceptualize a practical standard of state obligations to determine how core obligations are to be carried out, and let that standard guide the conceptualization of core rights. This creates a standard of state performance that floats with the current context of states. As such, first identifying the contextual purpose and utility of minimum core obligations enables us to create a standard with which we can determine a realistically enforceable content of core rights.

In what follows, I will present the doctrine of minimum core obligations as constituting what I will term as a ‘performative standard’ that is not subject to progressive realization. The performative nature of minimum core obligations should not be conflated with ‘positive obligations’. As Shue convincingly explicates, both positive and negative obligations involve performance and thereby both types of obligations also require resources.<sup>40</sup> Instead, ‘performativity’ indicates how minimum core obligations dictates the performance of state obligations, i.e. guides state action.

## **1.4 Making Sense of UN Documents and the Rule of Interpretation**

One point we must cover before we go on is the rules that govern how to make sense of UN treaty texts. The two types of UN documents that we will be engaged with are the international covenants on the one hand (International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights), and general comments (authoritative interpretations of the covenants) issued by the covenants’ respective monitoring bodies on the other. Because the content of the covenants is legally binding on states parties that have ratified or acceded the treaty thereby giving rise to formal obligations, it is also important that the interpretation follows the customary rules of international law pertaining to treaty interpretation.<sup>41</sup>

The general norm of treaty interpretation is accepted to be conveyed, *inter alia*, in the Vienna Convention on the Law of Treaties, Article 31-33, (adopted in 1969 and entered into force in

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<sup>40</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd ed. (Princeton, N.J.: Princeton, N.J.: Princeton University Press, 1996). p. 39-40.

<sup>41</sup> Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly* 9, no. 2 (1987). p. 160.



1980).<sup>42</sup> Article 31 (1) declares, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>43</sup> Emphasis is given on the particular context and intended purpose and object of the treaty text. The Vienna Convention, then, is helpful in providing us with a general guideline on how to go about interpreting these documents.

Additionally, a combination of the purposive approach and the textual approach is applied throughout the thesis. The purposive approach represents the method of deriving the meaning and content of a notion or concept from its perceived purpose, while the textual approach represents the method of deriving the meaning and content of a notion or concept from existing texts and documents. While the textual approach is the most accurate way of deriving the meaning of minimum core obligations, the purposive approach enables the researcher to explore the dimensions of the doctrine that is not explicitly conveyed in the UN documents. As a consequence, the two approaches complement each other and will be used in conjunction with each other.

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<sup>42</sup> Ibid.

<sup>43</sup> *Vienna Convention on the Law of Treaties*, (27 January 1980).

## II. ONE DECLARATION BUT TWO COVENANTS

Under the broader rubric of international law, international human rights law and its fundamental framework can be traced back to what we commonly refer to today as the ‘International Bill of Rights’.<sup>44</sup> The International Bill of Rights is comprised of a collection of three distinct United Nations instruments: the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), and International Covenant on Economic, Social, and Cultural Rights (1966). Universal Declaration of Human Rights – the centerpiece in the promotion of human rights – was a proclamation by United Nations and its member states to uphold universal human rights in “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.<sup>45</sup> Subsequently, the content of the declaration was divided into two categories –civil and political rights on the one hand, and economic, social and cultural rights on the other – forming two separate covenants that implemented the values of the declaration into binding international treaties.

To give a brief summary of the background in which a line was drawn between the two categories of rights, in the initial phase of the conception of human rights there were no distinctions between different kinds of rights as can be observed in the running text (or articles) of the Universal Declaration of Human Rights. The situation soon became apparent, however, after the proclamation of the Universal Declaration of Human rights that the Cold

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<sup>44</sup> A. Eide, "Economic, Social and Cultural Rights as Human Rights," in *Economic, Social, and Cultural Rights*, ed. A. Eide, C. Krause, and A. Rosas (Leiden: Leiden: Brill, 2001). p. 9.

<sup>45</sup> UN General Assembly, *Universal Declaration of Human Rights*, (10 December 1948). Preamble.

War presented itself with an ideological cleavage between the East and the West.<sup>46</sup> While the liberal states of the West emphasized the value of civil and political rights, socialist states of the East stressed the importance of economic, social and cultural rights. For socialist states, it was only natural that the state would provide for the protection of economic, social and cultural rights of its citizens as accorded by their ideology, while this was not so for the liberal states. The liberal states wanted to rely on the free market to provide for those rights and did not want to place the same emphasis on economic, social and cultural rights as they did on civil and political rights, at least in terms of the burden of implementation by the state. As such, while the Soviet Union together with other socialist countries pressed for immediate protection and enjoyment of economic, social and cultural rights to be drafted as part of the covenant, USA and other countries – mainly developing nations that felt the economic pressure of providing for the protection of economic, social and cultural rights – protested and demanded that those rights be drafted into the treaty text in a way that would allow for the gradual implementation of those rights.<sup>47</sup> Despite the ideological cleavage between the East and the West, the idea to differentiate the implementation of civil and political rights from economic, social and cultural rights was also supported by the general consensus of the era that there existed inherent differences between the two sets of rights.

Despite the fact that all rights were regarded as having equal importance and weight as exemplified in the Limburg Principles (1987), the common conception at the time was that the two sets of rights were characterized by significantly different traits that demanded the

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<sup>46</sup> O. De Schutter (ed.), *Economic, Social and Cultural Rights as Human Rights*, Human Rights Law; 6 (Edward Elgar, 2013). p. 2.; Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, 2nd ed.. ed. (Cambridge, United Kingdom: Cambridge, United Kingdom: Cambridge University Press, 2016). p. 401-2.

<sup>47</sup> Ilias Bantekas and Lutz Oette. p. 401.

two sets of rights to also be implemented in different ways.<sup>48</sup> Civil and political rights such as the right to life, right to be free from slavery, and right to liberty and security were viewed as ‘first generation’ rights, rights primarily of a negative nature, requiring states to abstain from certain actions that would infringe upon the rights of the right-holders. Due to this negative nature, civil and political rights were thought to be determinate enough and inexpensive enough to be implemented immediately by states. Civil and political rights were also viewed as being absolute in nature – constituting universal standards – and justiciable before the court. On the contrary, economic, social, and cultural rights such as the right to social security, right to adequate standard of living, and right to work were regarded as ‘second generation’ rights, rights primarily of positive nature compelling states to provide for the welfare of the right-holders. This programmatic nature of economic, social and cultural rights was thought to require extensive amounts of resources for the rights to be implemented, not to mention the meticulous government budgeting and policy-setting it also was believed to involve.

The result of this split was the creation of two separate covenants: International Covenant on Civil and Political Rights, and International Covenant on Economic, Social, and Cultural Rights, both ratified in 1966 and entered into force in 1976. Two separate monitoring bodies were also assigned to the two covenants: Human Rights Committee was assigned to oversee civil and political rights, while the Economic and Social Council<sup>49</sup> was given mandate over

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<sup>48</sup> UN Commission on Human Rights, "Note Verbale Dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva Addressed to the Centre for Human Rights ("Limburg Principles")," (1987). Para. 3.; UN General Assembly, *Annotations on the Text of the Draft International Covenants on Human Rights*, A/2929. Chapter II, Para. 9-12, 28.; Lisa Forman, Luljeta Caraoshi, Audrey R. Chapman, and Everaldo Lamprea. p. 535.; Fatma E. Marouf. p. 785.; A. Eide. p. 10.

<sup>49</sup> The Economic and Social Council received state reports and undertook much of the monitoring duty until it established the Committee on Economic, Social and Cultural Rights in 1985. See, *infra* Chapter III.

the supervision of economic, social and cultural rights. These monitoring bodies were given the function of receiving state reports and monitoring the progress of the signatory states parties, facilitating the fulfillment of human rights overall.

The distinction between the two sets of rights has narrowed in recent years as experts have come to the conclusion that both civil and political rights and economic, social and cultural rights alike constitute both positive and negative rights, with both sets of rights requiring resources to carry out (although to varying degrees). The distinction has narrowed to the extent that even the difference between the immediate effect of civil and political rights and progressive realization of economic, social and cultural rights has been subject to scrutiny<sup>50</sup>. The most prevalent distinction between the two sets of rights highlighted by scholars, however, remains to be the distinction between the immediate effect of civil and political rights and the progressive realization of economic, social and cultural rights, to which we will now turn.<sup>51</sup>

## **2.1 Immediate Effect Versus Progressive Realization**

Civil and political rights are regarded as requiring immediate implementation. This doctrine of immediate effect indirectly<sup>52</sup> conveyed in the International Covenant on Civil and Political Rights is presented in General Comment No. 31, paragraph 5 & 14, of the covenant's

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<sup>50</sup> For a discussion on the distinction between immediate effect and progressive realization, see Philip Alston and Gerard Quinn. p.172-3.

<sup>51</sup> Fatma E. Marouf. p.787.

<sup>52</sup> Indirectly conveyed, because the term 'immediate effect' does not appear in the International Covenant on Civil and Political Rights itself, but is rather interpreted to be conveyed to be so by the Human Rights Committee. General comments given out by the Human Rights Committee is deemed to be an authoritative interpretation of the covenant, much like its counterpart The Committee on Economic, Social and Cultural Rights.

monitoring body, the Human Rights Committee. The Human Rights Committee lays out the doctrine as follows (emphasis added):

The article 2, paragraph 1, obligation to respect and ensure the rights recognized by ~~in~~ the Covenant has *immediate effect* for all States parties. Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected. [...] <sup>53</sup>

The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of *immediate effect*. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State. <sup>54</sup>

Article 2 paragraph 1 of the International Covenant on Civil and Political Rights guarantees that all individuals will be ensured the civil and political rights recognized in the covenant without distinction to the person's "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". <sup>55</sup> Additionally, the guarantee that every individual is to be ensured the civil and political rights conveyed in the covenant immediately is taken as a general guiding principle of state action. <sup>56</sup>

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<sup>53</sup> UN Human Rights Committee, "General Comment No. 31 [80], the Nature of the General Legal Obligation Imposed on States Parties to the Covenant," (2004). Para. 5.

<sup>54</sup> Ibid. Para. 14.

<sup>55</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, (23 March 1976). Article 2, Para. 1.

<sup>56</sup> John Tasioulas. p. 12-13.

In contrast to this immediate effect guaranteed in the context of civil and political rights protection, economic, social and cultural rights are interpreted as giving states parties lenience to gradually fulfill their rights obligations. Progressive realization as laid out in article 2 paragraph 1 of the International Covenant on Economic, Social and Cultural Rights (hereinafter ‘the Covenant’), specifies that (emphasis added):

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, *with a view to achieving progressively the full realization of the rights recognized in the present Covenant* by all appropriate means, including particularly the adoption of legislative measures.<sup>57</sup>

Broadly speaking, the fundamental purpose of the Covenant is to “establish clear obligations for States parties”, guiding state action towards the eventual goal of full rights protection.<sup>58</sup> In the light of this goal, the doctrine of progressive realization serves as a mechanism of flexibility that takes into account the fact that most states do not have the resources to protect all Covenant rights fully, hence providing for economic, social and cultural rights to be realized gradually – over time – as more resources become available.<sup>59</sup> Alston and Quinn portray the role of progressive realization as “the linchpin of the whole Covenant” to highlight its key role in guiding state action, pointing out how “[u]pon its meaning turns the

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<sup>57</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, (3 January 1976). Article 2, Para. 1.

<sup>58</sup> CESCR, E/1991/23. Para. 9.; UN General Assembly, *Annotations on the Text of the Draft International Covenants on Human Rights*, A/2929. Chapter II, Para. 37.

<sup>59</sup> CESCR, E/1991/23. Para. 9.

nature of state obligations”.<sup>60</sup> The notion of progressive realization represents a condition of ‘progressivity’ that dictates the very nature of state obligations by constituting how obligations are permitted to be carried out, i.e. gradually. This role of progressive realization to dictate the nature of state action can be described as constituting a performative standard. It is ‘performative’ in the sense that the doctrine dictates *how* state obligations should be carried out.

## **2.2 Progressive Realization as a Performative Standard**

Progressive realization as a performative standard – a measure for human rights protection with which to assess and scrutinize state performance – can be best described as constituting a scale that ranges from “unsatisfied” on the one end, extending itself all the way up to “fully satisfied” on the other. The “unsatisfied” end of the scale represents utter neglect of human rights protection by a particular state where none of the human rights are met to any degree, meanwhile the “fully satisfied” end represents the full realization of human rights protection that is the ultimate goal of the Covenant. While the ideal would be for all states to achieve full satisfaction of all economic, social and cultural rights equally, in reality most states parties are located somewhere in between “unsatisfied” and “fully satisfied” – the “partially satisfied” of the scale due to certain realistic constraints on resources and time. Progressive realization could, then, be described as a doctrine that permits states parties to “partially satisfy” their human rights obligations – i.e. progressively fulfill their human rights obligations – until more resources become available.

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<sup>60</sup> Philip Alston and Gerard Quinn. p. 172.



Because the doctrine of progressive realization permits partial fulfillment of human rights, it is also difficult to constate that a particular state is failing to fulfill the Covenant rights, with the exception of one case. The Covenant emphasizes that states parties have a duty to move “as expeditiously and effectively as possible towards the full realization” of rights and that any deliberate retrogressive measure poses a violation of the Covenant.<sup>61</sup> How these conditions are determined, however, is a matter of debate.

Progressive realization as a performative standard is variable, or relative.<sup>62</sup> The doctrine is variable as each state party is permitted to implement their human rights obligations according to their own set pace. Each state assesses its own resource capabilities and implements its rights obligations over a set period of time as the state sees fit. As such, every country progresses differently in their protection of Covenant rights. Moreover, not only is the progress of each country unique, the way that a country fulfills the different rights conveyed in the Covenant can be uneven. There is no rule that forces a country to satisfy all the different kinds of rights at the same speed or time. Also, the countries also have a great amount of discretion in the way of means that they carry out their human rights obligations.

When we contrast progressive realization to the immediate nature of civil and political rights, we can identify two conditions with which progressivity is expressed. Progressive realization expresses gradual implementation of Covenant rights with regard to resources on the one

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<sup>61</sup> CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2002/11 (20 January 2003). Para. 18.; CESCR, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1 (C), of the Covenant)*, E/C.12/GC/17 (12 January 2006). Para. 26; UN Commission on Human Rights. Para. 21.

<sup>62</sup> Audrey Chapman and Sage Russell. p. 5.

hand, and time on the other. We can apply these two conditions into our scale metaphor of progressive realization by illustrating the scale of human rights protection from “unsatisfied” to “fully satisfied” to run along two axes: resource and time. The more resources and time a country acquires, the higher the level of human rights protection is required of it.<sup>63</sup> Progressive realization’s relativity with regard to resources and time means that human rights protection becomes flexible and can account for the realistic resource constraints that states parties face. The relativity does also mean, however, that when states parties claim that they are lacking in resource and time, the states cannot be held blameworthy for their lack of progress in protecting Covenant rights.

### **2.2.1 ‘Progressive’ with Regard to Resources**

Firstly, progressive realization expresses gradual implementation with regard to resources, or the lack thereof. Progressive realization allows for states to gradually fulfill their obligations in acknowledgment that many states, especially countries under development, are faced with resource constraints when asked to implement full protection of economic, social and cultural rights.<sup>64</sup> This concern for lack of resources is reflected in the phrase, “to the maximum of its available resources” (refer to article 2, paragraph 1, of the Covenant quoted above). Robertson explains that while the adjective “maximum” denotes the ideal extent of resource allocation, “available” reflects the realistic condition of state resources. Robertson formulates his point in this way: “‘Maximum’ is the sword of human rights rhetoric;

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<sup>63</sup> UN General Assembly, *Annotations on the Text of the Draft International Covenants on Human Rights*, A/2929, p. Chapter V, Para. 24.; Philip Alston and Gerard Quinn. p. 174.

<sup>64</sup> UN General Assembly, *Annotations on the Text of the Draft International Covenants on Human Rights*, A/2929, Chapter V, Para. 24.; CESCR, *General Comment No. 3*, E/1991/23. Para. 1.; Lillian Chenwi, "Unpacking 'Progressive Realisation', Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance," 46, no. 3 (2013). p. 744.

‘available’ is the wiggle room for the state.”<sup>65</sup> As such, states are obliged to attend to the fulfillment of Covenant rights to the utmost extent that their resources will allow. States are able to do only what they have the resources to do however, and a state cannot be held responsible for lack of progress that is beyond its resource capacity.

Here, “available resources” not only refers to resources within one’s own state, but includes also “international cooperation and assistance”, referring to resources available within the international community as a whole.<sup>66</sup> The Covenant evokes, therefore, the ‘secondary obligations’ of third-party states to assist the failing state. Secondary obligations are obligations incumbent upon third-parties that require them to assist the state that is failing and does not have the resources to fulfill its obligations. This way, when a state party has done everything within its resources to fulfill its rights obligations, the state is able to call upon other member states from the international community for assistance so that human rights violations can be prevented through collective effort.

### **2.2.2 ‘Progressive’ with Regard to Time**

Secondly, progressive realization expresses ‘progressivity’ with respect to time. Progressive realization allows for each state party to fulfill its obligations at its own pace gradually as resources become available. Progressive realization does, however, require immediate compliance in at least two cases. First, commentators on the Covenant converge on the

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<sup>65</sup> Robert Robertson, "Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights," *Human Rights Quarterly* 16, no. 4 (1994). p. 694.

<sup>66</sup> UN General Assembly, *Annotations on the Text of the Draft International Covenants on Human Rights*, A/2929. Chapter V, Para. 24; UN Commission on Human Rights. Para. 26.; CESCR, *General Comment No. 3*, E/1991/23. Para. 13, 14.; Lillian Chenwi. p. 749, 752-3.

interpretation of “to take steps” as implying that the initial stages, or first steps, of human rights implementation should occur either immediately or “within a reasonably short amount of time after the Covenant’s entry into force for the States concerned”.<sup>67</sup> In other words, states have a duty to begin the implementation process immediately once they have ratified and acceded the Covenant. Additionally, we can infer that immediate compliance also applies with respect to states parties’ obligation to produce state reports on the current and foreseeable progress as outlined in the Covenant.<sup>68</sup> Next, progressive realization demands immediate action to be taken against discrimination of individuals and groups “as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” in the implementation of Covenant rights.<sup>69</sup> Apart from these two main exceptions, however, progressive realization represents the gradual implementation of state obligations.

### **2.3 Problems related to Progressivity and Variability**

We can see that progressive realization constitutes a performative standard that expresses gradual implementation of Covenant rights with regard to resources and time, while also facilitating for variability between differing states parties, providing for each member state to progress towards the full realization of rights with relation to its own economic and temporal conditions. Soon after the Covenant was enacted, however, scholars began to notice

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<sup>67</sup> CESCR, *General Comment No. 3*, E/1991/23. Para. 2.; See also UN Commission on Human Rights. Para. 16., Philip Alston and Gerard Quinn. p. 165-6., and Lillian Chenwi. p. 774-5.

<sup>68</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, Article 17, Para. 1.

<sup>69</sup> Ibid. Article 2. Para. 2.; UN Commission on Human Rights. Para. 22, 35.; CESCR, *General Comment No. 3*, E/1991/23. Para. 1.

that progressive realization presented a number of difficulties when it came to monitoring the progress of and determining the violations against economic, social and cultural rights.<sup>70</sup>

First of all, gradual implementation of Covenant rights with regard to resources and time meant that states could claim that they did not have the necessary resources and time required for progress.<sup>71</sup> In conjunction with this problem, states could also fulfill the different rights conveyed in the Covenant unevenly, giving a certain right or facet of a right preference in terms of implementation.<sup>72</sup> The opposite was also possible. States parties could put off the implementation of certain rights or certain facets of rights with the excuse that there just wasn't enough resources to cover all rights fully. In addition to delays due to resource constraints, states could also abuse the theoretically indeterminate length of time that they were given by considerably delaying the implementation of rights, even in the case where the resources are available. States could argue that the implementation required more time, time and time again. In the end, it is not strange that states parties can always argue that they do not have enough resources or time, considering how that states are always "progressing" towards the end goal of full satisfaction of Covenant rights, indefinitely stuck in the "partially satisfied" section of the scale the progressive nature of progressive realization represents.

Additionally, the variable nature of progressive realization also meant that there was no common level of human rights protection that could be guaranteed fully at any point in time

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<sup>70</sup> UN General Assembly, *Annotations on the Text of the Draft International Covenants on Human Rights*, A/2929. Chapter V, Para. 23.; Philip Alston and Gerard Quinn. p. 172, 198.; Audrey Chapman, "A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights," *ibid.* 18, no. 1 (1996). p. 23, 30.; O. De Schutter (ed.). p. 4.

<sup>71</sup> Audrey Chapman and Sage Russell. p. 5.

<sup>72</sup> Eric A. Posner, *The Twilight of Human Rights Law* (New York: New York: Oxford University Press, 2014). p. 92.

across all states. Although various states parties could make progress in fulfilling parts of or a certain extent of the Covenant rights, it was impossible to assert that all, or even a specific group of rights, was being protected universally and simultaneously at a specific point in time. Hence, there was no guarantee that a certain type or level of rights protection that an individual would demand in a particular country, at a particular point in time, would be granted. This was a serious contestation to the fact that the very purpose of the Covenant was to articulate and enforce fundamental rights that should be guaranteed to all people and should, therefore, also not be violated.

Finally, the end goal of realizing all Covenant rights simultaneously and fully – the “fully satisfied” end of the progressive realization scale – was itself indeterminate. Because Covenant rights had been written in a general manner and the monitoring body to the Covenant back then (the Economic and Social Council) failed to clarify the exact normative content of those rights, it was unclear as to what the Covenant rights conveyed exactly. To take but one example, the right to “highest attainable standard of physical and mental health”, written in the Covenant as article 12, bears countless possible interpretations as to what it could denote. In addition to this, the content of rights conveyed in the Covenant was subject to constant change. In the inception of progressive realization, it was said that “the use of the word “progressively” in fact placed upon signatories a duty to achieve ever higher and higher levels of fulfilment of rights”, meaning that although Covenant rights remained the same, the level of fulfillment expected from each state party could theoretically be expanded indefinitely in conjunction to the increase of the level of resources of that country.<sup>73</sup>

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<sup>73</sup> UN General Assembly, *Annotations on the Text of the Draft International Covenants on Human Rights*, A/2929. Chapter V, Para. 24.; due to this ever-progressing nature of progressive realization, scholars such as Chapman have

Conclusively, while progressive realization was created to provide flexibility with regard to the implementation of economic, social and cultural rights, the progressive and variable nature of progressive realization also came to serve as the doctrine's Achilles' heel, preventing rights obligations from having the necessary effect on the states parties. What the original authors took to be the answer to creating a realistic and effective implementation mechanism, therefore, had come to serve the exact opposite effect, providing a means for various excuses and delays, a loophole for uneven rights implementation, and a human rights standard of protection that is relative to each nation and context. In light of these problems that progressive realization has come to face, one solution seemed to be to establish a standard of rights protection that would apply to all states parties without distinction to the states parties' "reasonable differences".<sup>74</sup> What many took to be answer was the introduction of minimum core obligations.<sup>75</sup>

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worked to develop alternative approaches to monitoring human rights protection, such as the 'Violations Approach'. For more details on the Violations Approach, see Audrey Chapman.

<sup>74</sup> Phillip Alston, "Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights," *ibid.* 9, no. 3 (1987). p. 352.

<sup>75</sup> *Ibid.*

### **III. THE DIFFERENCE BETWEEN CORE RIGHTS AND CORE OBLIGATIONS**

In 1985, the UN Economic and Social Council (ECOSOC) created the Committee on Economic, Social and Cultural Rights – an advisory body to the council, comprised of 18 independent experts, mandated with the purpose of monitoring the implementation of the Covenant.<sup>76</sup> Like its counterpart, the Human Rights Committee that monitors the implementation of civil and political rights, the Committee on Economic, Social and Cultural Rights (hereinafter ‘the Committee’) receives reports from states parties every five years, examines them, and addresses concerns or gives recommendations on the states parties’ behavior and progress.<sup>77</sup> In addition, the Committee presents interpretations of the provisions contained in the Covenant in the form of ‘general comments’. As authoritative interpretations of the Covenant, these general comments have come to carry considerable weight, albeit not absolute<sup>78</sup>.

In 1990, the Committee presented the doctrine of minimum core obligations for the first time in its General Comment No. 3, On the nature of states parties’ obligations as presented in article 2(1) of the Covenant, paragraph 10 (emphasis added):

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<sup>76</sup> ECOSOC, "Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights," (1985).

<sup>77</sup> There exist some minimal differences on the condition of state reports between the Human Rights Committee and the Committee on Economic, Social and Cultural Rights.

<sup>78</sup> See *supra* note 8.



On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that *a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party*. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take into account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>79</sup>

Out of the whole general comment 3 paragraph 10 quoted above, the doctrine of minimum core obligations is epitomized in this one sentence: "[T]he Committee is of the view that a

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<sup>79</sup> CESCR, *General Comment No. 3*, E/1991/23. Para. 10.

minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”<sup>80</sup>

### 3.1 Core Rights

On the one hand, we have what we will refer to as ‘core rights’<sup>81</sup>. The Committee points out that there exist certain “minimum essential levels” of each of the Covenant rights. This minimum essential level indicates a demarcation within the whole of Covenant rights where a subgroup of rights is identified and set apart. This demarcated subgroup of rights can be referred to as core rights. Demarcating the core from the periphery involves identifying a certain trait that characterizes the core but that is absent in the periphery, heightening the status of the core in relation to the periphery. Put differently, distinguishing core rights from periphery rights involves constructing a hierarchy of values within each and every Covenant right and drawing a line between core rights and non-core rights – between rights to be prioritized and rights that are second-listed on the list of priority.<sup>82</sup> The question that follows is then, what kind of condition or nature can give reason for the priority that core rights enjoy over non-core rights?

The priority that sets apart core rights from periphery rights is characterized by the *urgency* of core rights.<sup>83</sup> This is exemplified in the way that the core rights are articulated as

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<sup>80</sup> Ibid. Para. 10.

<sup>81</sup> The Committee uses this term in conjunction with determining the core content of economic, social and cultural rights. Refer to the Committee’s general comments 8 & 12.

<sup>82</sup> David Bilchitz, "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence," *South African Journal on Human Rights* 19, no. 1 (2003): p. 15-16.; Audrey Chapman and Sage Russell. p. 9.; Sage Russell. p. 15.

<sup>83</sup> Karin Lehmann. p. 8.

constituting that essential part of rights that must be ensured “at the very least” that states parties must ensure.<sup>84</sup> Some examples of core rights that the Committee provides are “essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education”.<sup>85</sup> Core rights, thus, represents the “minimum essential level” of each of the rights that each individual is entitled to (we can, therefore, also refer to core rights as core entitlements or minimum entitlements). It represents that level or standard of human rights protection that should be guaranteed. It is “the line beneath which no one is to be allowed to sink”.<sup>86</sup>

### **3.2 Core Obligations**

On the other hand, we have minimum core obligations, or what we will refer to as ‘core obligations’<sup>87</sup> in order to show the reciprocal relationship between the notion of minimum core obligations and core rights. The Committee explains that states parties have a minimum core obligation “to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”.<sup>88</sup> The ‘core’ in core obligations refers to two distinct characteristics of core obligations.

Firstly, core obligations represent the subgroup of obligations that derive from core rights, or put in different terms, core obligations correspond to the duty that is necessitated by the entitlement that core rights connote. In this way, the ‘core’ in core obligations derives from

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<sup>84</sup> CESCR, *General Comment No. 3*, E/1991/23. Para. 10.

<sup>85</sup> *Ibid.*

<sup>86</sup> Henry Shue. p. 18.

<sup>87</sup> For Committee’s use of this terminology, refer to general comments 14, 15, 17, 18, 19, 21, 22, & 23.

<sup>88</sup> CESCR, *General Comment No. 3*, E/1991/23.

its correspondence to core rights. While core rights answer the question of what must be fulfilled, referring to the scope and content of the minimum essential level of Covenant rights, core obligations answer the question of how – how core rights should be ensured. As such, core obligations represent a standard of state action, or performance, which we can refer to as a performative standard. Core obligations dictate how states parties should enforce and implement the rights obligations that derive from core rights. It is important to add that the performative nature of core obligations does not assume a hierarchy of values in itself. In other words, core obligations do not answer the question of *why* obligations that derive from core rights should be carried out differently from those obligations that derive from non-core rights. Instead, as core rights determine which rights belong to the core, core obligations only reflect that hierarchy by dictating *how* those rights will be ensured or protected.

The second characteristic that the term ‘core’ in core obligations highlights is the way that doctrine of minimum core obligations constitutes a more stringent performative standard that contrasts – but also complements – progressive realization. We examined in the previous chapter how progressive realization represents a performative standard that is flexible in terms of progress and variability; flexible in terms of progress with regard to resources and time, and flexible in terms of variability with regard to tolerating discrepancy between states parties. Additionally, progressive realization constitutes a scale that ranges from “unsatisfied” to “fully satisfied”. In contrast to the progressive scale that progressive realization represents, then, minimum core obligations represent a ‘dichotomic’ scale. The doctrine of minimum core obligations constitutes a performative standard that is represented by a dichotomy of “unsatisfied” on the one hand, and “fully satisfied” on the other. In other words, core rights are either fully protected, or they are not. The “minimum essential levels” of each of the

rights is ensured as a whole, or in the case that even a slight facet of any of the core rights is not ensured core rights are not satisfied as a whole. The minimum entitlements of individuals are ensured, or they are not. All of these statements express the one and same idea that there should exist no gray area, no partial fulfillment, and therefore also no ambiguity when it comes to ensuring core rights. Otherwise, there would be no point of conceptualizing an additional performative standard of minimum core obligations on top of the already existing progressive realization.

If minimum core obligations expressed the same flexibility and progressivity that progressive realization did by constituting a broad spectrum of human rights protection where the actions of almost any state would fall into the “partially satisfied” section of human rights protection, the doctrine would not be fulfilling any specific purpose. Minimum core obligations contrast progressive realization by creating a distinct performative standard that is dichotomic in nature, while the doctrine also complements progressive realization by constituting a performative standard that takes on a role or function that progressive realization does not or cannot. This relationship between minimum core obligations and progressive realization constitutes the creation of two separate conceptual domains, with the former working to limit the domain of operation of the latter.<sup>89</sup>

Conclusively, we can see that core rights and core obligations constitute two sides of the same coin. Core rights represent minimum entitlements of human beings while core obligations represent state action to ensure those entitlements. We can argue, however, that

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<sup>89</sup> John Tasioulas. p. 14.

the doctrine of minimum core obligations as a performative standard – a standard of state performance – refers exclusively to the obligations side of the coin. In other words, our construal of the notion of minimum core obligations refers exclusively to its function as a performative standard that is not subject to progressive realization.

If the doctrine of minimum core obligations constitutes a performative standard that is dichotomic in nature and that is not subject to progressive realization, then what are its implications? In other words, what kind of standard does minimum core obligations need to constitute in order to create a standard of state performance that will most effectively complement progressive realization? In order to answer this question, we will first return to the two main problems that progressive realization poses and derive an answer therefrom.

### **3.3 Minimum Core Obligations to Complement Progressive Realization**

Progressive realization poses two main problems to human rights protection. First of all, progressive realization implies progressivity with regard to resources and time. This progressive nature causes problems in at least three ways. States parties can claim that they do not possess enough resources. This is possible because according to progressive realization, states parties are only obliged to ensure the level of human rights protection that their resources allow them. Next, states parties can also claim that they did not have enough time to carry out the obligations allotted. This second problem is also quite straight forward. Implementing certain rights takes time, and since the doctrine of progressive realization does not set a uniform standard of time, states parties are able to theoretically claim as much time as they see necessary in order for them to carry out their obligations. Finally, states parties

are able to fulfill their obligations unevenly with regard to different rights.<sup>90</sup> This last problem might require a more detailed explanation. For example, with regard to the right to the highest attainable standard of health (Covenant, article 12), states can concentrate their resources on creating big and expensive health centers that benefit the rich, while paying little attention to providing essential medical care to those who are relatively more in need of it. Additionally, from the temporal standpoint, projects aimed at aiding the poor can be scheduled later or be indefinitely delayed in theory. This kind of uneven fulfillment of rights can be translated into unequal and unfair rights protection that can be employed to disregard a particular geographic region (tied to historical or cultural factors) or target specific groups in society. The Covenant is explicit about the duty for all states parties to protect individuals from human rights violations that discriminates against certain identities, social classes, or beliefs. Nevertheless, uneven implementation of rights obligations made possible by progressive realization means that inequality and discrimination can arise indirectly and leaves open a margin for exploitation and a reason for excuses.

Next, the problem of variability creates a situation where human rights protection is not guaranteed by one single universal standard. Rather, the variable nature of progressive realization leaves up to each and every state party to determine its own level of human rights protection according to its own available resources. Secondary obligations that oblige the more well-off states to help those states that are not able to fulfill their obligations also loses a lot of its meaning because it is difficult for states parties to determine when enough foreign aid is enough and when the human rights protection of the aided state reaches a satisfactory

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<sup>90</sup> Eric A. Posner. p. 92.

level. Essentially, because the level of human rights protection increases with available resources, there are also no logical cut points up to which the failing state can ask for international support (or up to which third-party states feel obliged to help support).

These problems that derive from the progressive and variable nature of progressive realization calls for the creation of a standard of state performance in protecting human rights that can complement these deficits of progressive realization. In other words, progressive realization's progressivity and variability creates a condition that occasions for the conceptualization of minimum core obligations as an inflexible and invariant standard of state performance in contrast to progressive realization. Tasioulas' minimum core obligations is one such theory that seems to provide an answer to most of these concerns noted above. In the coming sections, we will examine Tasioulas' theory to see whether it gives us a solution to progressive realization's problems of progressivity and variability.

### **3.4 Tasioulas' Theory of Immediacy, Completeness, And Universality**

Tasioulas conceptualizes minimum core obligations as constituting "the sub-set of obligations associated with economic, social and cultural rights that must be *immediately* complied with *in full* by *all states*".<sup>91</sup> This sentence highlights the three main tenets of his theory – immediacy, completeness and universality. The first element – *immediacy* – represents a temporal condition, that the obligations should be adhered to right away. According to Tasioulas, the element of immediacy demands that states implement minimum

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<sup>91</sup> John Tasioulas. Executive Summary V.



core obligations immediately without excuse to resource and capability constraints that they face.

The second element of Tasioulas' theory is *completeness*. Completeness requires states parties to implement minimum core obligations fully and wholly, and not impartially or unevenly. Since minimum core obligations make up a subgroup within the general domain of human rights obligations, minimum core obligations are also required to comply with both the general standard that applies to all human rights obligations as well as constituting its own requirement of immediacy. Overall, there are two general standards that guide human rights obligations. These are the feasibility and holistic constraints.<sup>92</sup> First, the feasibility constraint refers to the demand that it should be possible for those who are obliged to observe the obligations to carry them out, as illustrated by the maxim of 'ought implies can', and that it should therefore also not be unduly burdensome for states parties to carry them out. These two criteria of feasibility, that it should be possible to carry the obligations out and that they should not be unduly burdensome, tackle the idea of setting unrealistic and unachievable standards of human rights obligation so as to demand from states parties something that can feasibly performed.<sup>93</sup> The second notion, the holistic constraint, requires that the set of core obligations corresponding to core rights be consistent with one another and consistent with the entirety of core obligations as a single entity. While minimum core obligations consist of a multiplicity of obligations deriving from different human rights and as a number of obligations can derive from one and the same right, the holistic constraint demands that minimum core obligations do not contradict one another, being able to function as one single

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<sup>92</sup> Ibid. p. 22.

<sup>93</sup> Ibid. p. 6.

core. This means that minimum core obligations must be “immediately fully realizable *simultaneously*, and the immediate satisfaction of each obligation must not be unduly burdensome in light of the requirement to satisfy immediately the other core obligations”.<sup>94</sup>

Lastly, the third element of Tasioulas’ minimum core obligations is *universality*. Universality represents the element of minimum core obligations that demands all states to comply with their obligations irrespective of each state party’s individual level of resources and capabilities. In other words, universality sets a common standard across all states parties in order to standardize the level of state compliance globally. The way that Tasioulas does this is by first identifying a particular level of state capacity, then, using this standard state capacity, a standard baseline of state compliance is drawn across all states parties.<sup>95</sup> We can illustrate this idea by contrasting universality with variability. Variability allows for the level of state compliance to be adjusted in relation to the level of resources of that particular country, as exemplified by progressive realization. In contrast, universality sets a standard baseline of state compliance that is applied across all states parties without distinction to the states’ varying levels of resources.<sup>96</sup> To take one of Tasioulas’ examples, let us propose that Switzerland and Mali differ greatly in their level of resources. Now, on the side of the variant standard, Switzerland must secure a higher level of minimum core obligations than Mali because Switzerland is much more well off in comparison to Mali in terms of resources. However, from a universal standard, the two states must secure the same level of core rights without distinction to the state’s relative wealth or resources.<sup>97</sup>

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<sup>94</sup> Ibid. p. 22.

<sup>95</sup> Ibid. p. 23.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

### **3.4.1 Standard Baseline of State Capacity**

According to Tasioulas, the standard baseline of state compliance can be determined by asking this question, “Can this obligation be imposed on all states, in the reasonable expectation that for almost all states, for almost all of the time, it is possible and not unduly burdensome for them immediately to comply with the putative obligation in full?”<sup>98</sup> Of course, answering this question is no simple matter. By asking this question, however, we are able to derive a standard baseline of state capacity that can be applied across all states with which to assess whether minimum core obligations have been fulfilled – that is “satisfied” – or not. Also, for Tasioulas, state capacity in this sense encompasses not only wealth and natural resources but also institutional and technological capabilities defined broadly.

The reason why this question is formulated specifically to not include “all states parties, at all times” is because not all states will be able to comply with all the minimum core obligations all the time whether it be due to emergency situations, internal struggles, or natural disasters. It is therefore more reasonable to set the standard baseline at a level of compliance that is achievable “for almost all states, for almost all of the time”, leaving room for states parties that are failing to fulfill their minimum core obligations to give justification for periods or times of non-fulfillment. In such cases, secondary obligations can come into play and require third-party states or non-governmental actors to step in and provide for the assistance necessary. This creates an environment of cooperation and moderate redistribution

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<sup>98</sup> Ibid. p. 24.

of resources in the international realm as envisioned in the Covenant.<sup>99</sup> Also, in response to the argument that the doctrine of minimum core obligations is too rigid and that it does not provide room for states parties to express their contextual and cultural differences, Tasioulas provides four cases or conditions under which minimum core obligations express flexibility.

### **3.4.2 Four Conditions That Allow States Parties to Express Variability**

The first condition is contextual relativity. Contextual relativity refers to “environmental, cultural, or other differences” such as language that allows for context and culture of each state to be reflected in the way it carries out its minimum core obligations.<sup>100</sup> For example, states may respond differently to the right to adequate clothing since what is recognized as adequate clothing may differ between states depending on their specific culture and environment. The “right to clothing – adequate to offer protection from the elements and ‘to appear in public without shame’ – will require access to a winter coat in Scotland”, while it might require a simple t-shirt in Suriname.<sup>101</sup>

Next, the content of minimum core obligations may be formulated in a way that allows for discrepancy in the way that different states interpret the content of the rights differently. This relativity with regard to interpretation can be referred to as ‘margin of appreciation’ or ‘subsidiary’.<sup>102</sup> A number of different kinds of policies or methods of implementation could derive from one and the same right. For example, different kinds of educational curricula

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<sup>99</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, Article 2.1, 11.2, 15.4, 22, and 23.

<sup>100</sup> John Tasioulas, p. 28.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

could satisfy the abstract standard of “the most basic forms of education”.<sup>103</sup> This provides states with a repertoire of choices within a defined scope of interpretation so that the moral reasoning and the decisions of a state and its citizens – and the self-determination of the populace thereof – is respected.

The third condition allows states to derogate from fulfilling the minimum core obligations in cases of an emergency such as war, famine, internal struggles, or environmental disasters. In such cases, states are permitted to provide justifications and excuses as to why they were not able to fulfill the minimum core obligations. Derogation allows for some wiggle room when states parties undergo crises or rough periods. In such cases, secondary obligations of other states and non-governmental organizations can be evoked to assist the state in need.<sup>104</sup>

Finally, there remains the prospect for the content of minimum core obligations to change. This last condition – prospects for change – implies that the content of minimum core obligations is prone to change over time in parallel with technological advancements, environmental shifts, and other developments that may occur. All of the changes mentioned above may affect the feasibility of states in fulfilling the minimum core obligations. In other words, what is required to fulfill the minimum core obligations may become more stringent as advancements with regard to particular rights may occur and the standard “goes up”. On the other hand, conditions may also deteriorate causing the standard baseline of minimum core obligations to loosen. As the conditions of feasibility expands or contracts, therefore, so too can the content of minimum core obligations change with it.

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<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

### 3.5 Implications of Tasioulas' Theory

Now that we have explored the content of Tasioulas' theory on minimum core obligations, let us consider the implications of his theory. The structure of Tasioulas' theory on minimum core obligations can be summed up in the following points.

1. "Minimum core obligations [...] are the subset of obligations associated with economic, social and cultural rights that must be *immediately* complied with *in full* by *all states*."<sup>105</sup>
2. Immediacy, completeness, and universality imply that minimum core obligations
  - a. demand immediate compliance,
  - b. are feasible (i.e. both possible and not unduly burdensome),
  - c. are consistent and compatible among obligations individually and as a whole,
  - d. and constitutes a standard baseline of state capacity for all states,
    - i. with the reservation for four conditions of variability:
      - contextual relativity,
      - obligation formulation,
      - derogation,
      - and prospects for change.

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<sup>105</sup> Ibid. Executive Summary V.

3. The content of minimum core obligations is constrained by the sum of these conditions listed above (a-d) to establish one single unified standard of state obligations.

Tasioulas' theory of minimum core obligations suggests three fundamental elements: immediacy, completeness, and universality. These three elements work in tandem with each other to determine the nature of state obligations. Minimum core obligations are obligations of (a) immediate effect, that are (b) both possible and not unduly burdensome for states to carry out, (c) consistent and compatible internally, and (d) sets a standard baseline of state capacity across all states. Tasioulas also reserves four conditions of variability as represented by four points under (i). And finally, the last point (3) brings together all of the points listed above into one single and unified performative standard of minimum core obligations that contrasts progressive realization.

First of all, Tasioulas' theory of minimum core obligations complements the progressivity with regard to time that is expressed by progressive realization. The condition of immediacy in Tasioulas' theory requires immediate implementation of core obligations that is applied across all states. We can, however, add to the existing notion of immediacy here. From a general perspective, the condition of immediacy sets up a universal temporal standard against the flexible nature of progressive realization. However, we can also define immediacy as representing something more than just a temporal condition of implementing state obligations "right away" or "immediately" without hesitation or delay. Immediacy also conveys the dichotomic nature of minimum core obligations as constituting a performative standard that is either "unsatisfied" or "fully satisfied". In this context, immediacy represents

the requirement that states parties should always “fully satisfy” the core rights, and that even the slightest nonfulfillment of core obligations constitutes a violation against the doctrine of minimum core obligations. This way, not only does immediacy constitute a temporal standard of state compliance, but it also implies a conceptual standard of completeness – that core rights must always be “fully satisfied” through relentless observation of all core obligations. The condition of immediacy constitutes a standard of state performance that is easily identified and monitored as opposed to the progressive nature of progressive realization. Immediacy, then, complements the progressive nature of progressive realization by setting up a separate domain of operation governed by the stringent and universal temporal standard of immediateness.

Next, the notion of the standard baseline complements the progressive nature of progressive realization with regard to resources. The standard baseline demands the same level of core rights to be satisfied across all states by creating one common standard of state capacity. Creating a single standard of state capacity means that states parties must fulfill all core obligations up to that particular standard, resolving the problem of the possibility that core rights may be realized unevenly. How the standard baseline can be determined is through asking the question, “Can this obligation be imposed on all states, in the reasonable expectation that for almost all states, for almost all of the time, it is possible and not unduly burdensome for them immediately to comply with the putative obligation in full?”<sup>106</sup> The implications of this question must first be unpacked. First, setting the standard baseline at a level where “almost all states” will be able to fulfill their obligations “for almost all of the

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<sup>106</sup> Ibid. p. 24.



time” creates a scenario where there will be occasions where states parties will not be able to fulfill their obligations. These scenarios can consist of natural disasters, internal conflicts, or war. In such cases, states parties are able to derogate from their minimum core obligations by giving a reasonable justification as to why they have derogated from the standard. If the justification given is reasonable, the state party in question is not blameworthy for its nonfulfillment. Now, let us consider the alternative options.

One plausible alternative scenario to setting the standard baseline at a level where most states will be able to fulfill their obligations at most times, with reservation for derogation in times of crises, is to set the standard baseline so low that it will be almost impossible for any state to not fulfill its rights obligations unless core rights are violated with intent or malice. Setting the standard baseline so low ensures that all states will be able to fulfill their core obligations, i.e. it creates a standard what we can be confident will be ensured at almost all times, with the exception of those cases where core rights are intentionally violated. Setting the standard baseline so low, however, with protecting only the bare minimum level of human rights may render minimum core obligations meaningless. The level of human rights protection pertaining to core rights may become so negligible that minimum core obligations may come to be understood only as a tool to monitor intentional violations against core rights. Setting the standard baseline so low will also remove the possibility for redistribution of resources within the international community. The doctrine of minimum core obligations presents itself as a great opportunity within the international realm to create a system of moderate redistribution with regard to resources among states. However, if the standard baseline were to be set so low that all states would be able to fulfill their obligations, then the existing

opportunity for the creation of an international system of moderate redistribution would be lost.

Another plausible alternative is to set the standard baseline at a level where most states will be able to fulfill their obligations at most times, but without the opportunity for states parties to derogate from their obligations, i.e. to construe minimum core obligations as non-derogable. This scenario would mean that when states parties derogate from their core obligations, even in times of crises a state would be violating the core rights and would be blameworthy of their violations as a consequence. Constituting minimum core obligations as non-derogable may be the more plausible alternative with consideration that the concept of the core has traditionally been construed as that part of human rights that is not derogable.<sup>107</sup> There is the possibility, however, that construing minimum core obligations as non-derogable would make it unrealistic and insensitive to the particular circumstances that states parties may find themselves in, despite their utmost efforts to fulfill their obligations. Moreover, the stance of the Committee seems to support derogation in its statement:

In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>108</sup>

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<sup>107</sup> Ingrid Leijten.; Esin Örüci.

<sup>108</sup> CESCR, *General Comment No. 3*, E/1991/23. Para. 10.

Lastly, the condition of universality constitutes a global standard of state compliance, in the form of the standard baseline with regard to resources, and in the form of immediate effect with regard to time, complementing the variable nature of progressive realization. Universality, by setting a common standard across all states, creates a uniform standard of state performance and compliance. The uniformity fixed across all states means that a particular level of human rights protection can be guaranteed across the globe, answering the problem of relativity and uncertainty that progressive realization entails. Because all states are to implement their core obligations up to a certain level of human rights protection immediately, despite differences in resources, individuals can be guaranteed a minimum level of human rights protection that is not guaranteed by progressive realization. In conjunction with universality that guarantees the universal standardization of the doctrine of minimum core obligations, feasibility and holistic constraints guarantee the internal consistency of the doctrine, requiring core obligations to be consistent and enforceable as a whole.

## IV. CONCLUSION

At the outset of this thesis, we ran into a criticism geared against the doctrine of minimum core obligations put forth by Harris, suggesting that by setting a minimum within the minimum, the doctrine undermines the full implementation of economic, social and cultural rights. It has been argued in this thesis that the doctrine of minimum core obligations constitutes a standard of performance that complements the flexible nature of progressive realization, answering the criticism that Harris has laid forth. The question that remains to be answered, however, is whether the performative standard that the doctrine of minimum core obligations constitutes is compatible with the content of minimum core obligations laid out by the Committee in its general comments. In recent years, the Committee has shown commitment towards noting down and presenting a comprehensive list of content of each economic, social and cultural right. These lists presented in the Committee's general comments have arguably been far too comprehensive to constitute what they call the core content of economic, social and cultural rights and its corresponding obligations. As such, in a future investigation it would be interesting to probe whether the particular conceptualization of minimum core obligations as a performative standard laid out in this thesis could guide the interpretation of the content listed up in the Committee's general comments in the construction of a core content that is both realizable and in line with the interpretation rules of international human rights law.

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